No. 10,187

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JULIA C. COLLINS and HATTIE L. MOSHER,
Appellants,

vs.

JOE O'CONNELL and JESSIE B. O'CONNELL
(husband and wife),
Appellees.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

A.

STATEMENT OF PLEADINGS AND FACTS GIVING JURISDICTION TO DISTRICT COURT AND TO CIRCUIT COURT OF APPEALS.

1—The jurisdiction of the District Court was acquired By Removal Proceedings. Complaint, Transcript of Record, Page 2.

The complaint shows upon its face that there are two defendants, to-wit:

JULIA C. COLLINS and HATTIE L. MOSHER.

That the mortgage foreclosed by Elsie B. Ganz upon which plaintiffs claim title was in the amount of Six Thousand Dollars ($6000.00).

The complaint likewise discloses the existence of a separable controversy because paragraph VIII shows that the Certificate of Sale and the Deed of the Special Master were issued to Julia C. Collins conveying all interest of Hattie L. Mosher to Julia C. Collins, and therefore, The Question Of Title is Altogether Separate as between plaintiffs and Julia C. Collins.

The Order of the Superior Court of Maricopa County, State of Arizona, signed by G. A. Rodgers, Presiding Judge, which has never been assailed, nor contradicted in any manner, finds that:

a—Julia C. Collins is a non resident of the State of Arizona and is a resident of the State of Oregon.

b—That Julia C. Collins had filed her petition for removal, her bond for removal and had given notice thereof, all in due form and within the required time.

c—That there was a separable controversy between the plaintiffs and Julia C. Collins. Order of Removal appearing in the Transcript of Record at page 7.

The jurisdiction of the District Court is sustained by United States Code Annotated Title 28, Section 71.

The jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is sustained by the United States Code Annotated Title 28, Section 225 (a) Review of final decisions (part First thereof). No treaty or statute is involved.

The Notice of Appeal to the Circuit Court of Appeals may be found in the T. of R., P. 52.

The Bond on Appeal to the Circuit Court of Appeals may be found in the T. of R., P. 53.

B.

CONCISE STATEMENT OF THE CASE PRESENTING QUESTIONS INVOLVED AND HOW RAISED.

Greene and Griffin were originally the owners of Lots 1, and 2, Block 3, Churchill Addition to the City of Phoenix, Maricopa County, Arizona.

They executed a mortgage for $9000.00 on this property to J. Gerard. The property was then deeded to Hattie L. Mosher subject to the mortgage. The mortgage was later assigned to Julia Mosher-Collins by J. Gerard. Julia Mosher-Collins executed a General Power of Attorney to Hattie L. Mosher and Hattie L. Mosher using this Power of Attorney purported to assign this Gerard $9000.00 mortgage from Julia Mosher-Collins on her own land to James Dean Collins. After the death of Julia Mosher-Collins James Dean Collins purported to release Lot 2, which was one-half of the mortgaged land, with no reduction of the original amount of $9000.00, and Hattie L. Mosher then executed another mortgage upon the same property released to Elsie B. Ganz for $6000.00.

Elsie B. Ganz foreclosed the mortgage from Hattie L. Mosher to herself but did not include in her foreclosure suit Julia C. Collins who is the daughter and sole heir of Julia Mosher Collins, deceased.

Julia C. Collins did not recognize the validity of the assignment from, and by, Hattie L. Mosher, made with her Power of Attorney, to James Dean Collins, nor of the Release of Mortgage based thereon nor of the mortgage executed to Elsie B. Ganz by Hattie L. Mosher.

Julia C. Collins through her guardian ad litem brought suit as the owner of the old $9000.00 Gerard mortgage against Hattie L. Mosher and got judgment resulting in a Certificate of Sale and a Deed from the Special Master appointed by the Court making her the sole owner of Lot 2, Block 3, Churchill Addition.

Joe O'Connell and Jessie B. O'Connell, Grantees by deed from Elsie B. Ganz now bring suit to set aside the deed of the Special Master and the Question is were the things done leading up to the Ganz deed legal and was the old Gerard mortgage properly assigned and satisfied. The burden of establishing the title of Elsie B. Ganz and Joe O'Connell of course rests upon the appellees, and the appellants raised some sixteen objections to the sufficiency of the evidence and the proceedings, laying special stress, however, upon the question of the validity of the purported assignment by Hattie L. Mosher to James Dean Collins and the release of said Gerard mortgage by James Dean Collins. If this assignment and release were invalid, then the Gerard mortgage was never satisfied and descended to Julia C. Collins and she is now the owner of the property.

A more detailed chronology of the facts is set forth hereafter in this brief with proper references to pages of the Transcript of Record.

C.

ERRORS RELIED UPON.

I.

The Court erred in rendering judgment Quieting the Title to Lot 2, Block 3, Churchill, in the plaintiffs, Joe O'Connell and Jessie B. O'Connell because said judgment is contrary to the irrefutable and indisputable evidence in the case for the following reasons:

A—The Plaintiffs' Exhibit No. 1, T. of R., P. 108, showed upon its face that Julia C. Collins was no party to No. 35462 in the Superior Court, being the Ganz Foreclosure Suit, and therefore was not bound thereby.

B—The Record shows that the Attorney and Agent for Mrs. Ganz, J. L. B. Alexander, knew that her mortgage was a second mortgage.

C—The Record shows that no title by adverse possession could have been acquired because the taxes were not paid by Joe O'Connell for 5 consecutive years; the taxes were paid as tenant and not as owner; The O'Connell Brothers, a corporation, and not Joe O'Connell, are and always have been in possession since the Ganz deed to Joe O'Connell and in any event the defendant, Julia C. Collins, had not been of age five years when this suit was commenced.

D—The Assignment of Mortgage from Julia Mosher Collins to James Dean Collins is not acknowledged by the Attorney in Fact as required by law, but is acknowledged by Hattie L. Mosher, as an individual.

E—Defendants' Exhibit D, being the Certified Copies of the instruments in Equity No. 319, resulting in the Deed from the Master in Chancery, conclusively show that Julia C. Collins is the owner of the title to the premises in fee simple.

F—The evidence conclusively shows that the assignment of mortgage from Julia Mosher Collins to James Dean Collins was never delivered and was an attempt to deal in a subject which the transferring agent and Attorney in Fact had a personal interest in adverse to that of her daughter, and principal, Julia Mosher Collins.

II.

The court erred in denying defendants' objections to plaintiffs' Statement of Costs.

III.

The court erred in denying defendants' Motion for New Trial because the evidence in the case conclusively showed that judgment as rendered was erroneous and contrary to all the evidence in the case as more specifically set forth under the first Assignment of Error.

D.

ARGUMENT OF CASE. SUMMARY OF FACTS WITH EXACT DATES AND PAGES OF THE RECORD.

Greene and Griffin, the owners of Lots 1, and 2, Block 3, Churchill Addition to the City of Phoenix, State of Arizona, executed a mortgage to J. Gerard, a widow, in the sum of $9000.00.

On February 24, 1913, dated. Recorded at request of Josephine Gerard May 29, 1913, at 9:50 A. M., in Book 85, of Mortgages, at Page 303, being Defendants' Exhibit A. T. of R., P. 205.

On July 9, 1914, Greene and Griffin deeded Lots 1, and 2, Block 3, Churchill, to Hattie L. Mosher, widow, subject to the aforesaid mortgage. T. of R., P. 210.

On July 20, 1915, Julia Mosher Collins, the daughter, and only child, of Hattie L. Mosher, executed a General Power of Attorney to her mother, Hattie L. Mosher; recorded six years later, at request of Hattie L. Mosher, in Book 5, of Power of Attorneys, at pages 141 and 142. Plaintiffs' Exhibit 4, T. of R., P. 185.

This Power of Attorney was not recorded, as the Record shows, until April 2, 1921, which was a year after the death of the principal, Julia Mosher Collins, and recorded at the Request of the holder.

There was no showing of any delivery of this Power of Attorney which was put of record by the agent, herself. See T. of R., P. 187, last line, apparently in order to make and transfer an Assignment of the mortgage upon her own land. This assignment is Plaintiffs' Exhibit 4, T. of R., 183.

Previously, October 7, 1918, the said Gerard Mortgage was extended by agreement between J. Gerard, mortgagee, and Hattie L. Mosher, mortgagor, by assumption from Greene and Griffin. See T. of R., P. 178. A year later, October 7, 1919, J. Gerard assigned said mortgage to Julia Mosher Collins. Said assign-

ment was recorded November 8, 1919. Defendants' Exhibit A, T. of R., p. 216.

On March 1, 1920, Hattie L. Mosher, Attorney in Fact for Julia Mosher Collins, executed an assignment of said mortgage to James Dean Collins. Plaintiffs' Exhibit 4, T. of R., P. 183. The said assignment not being recorded by Hattie L. Mosher, the owner of the land, until April 18, 1921, at 1:11 P. M. one year after the death of her principal, Julia Mosher Collins, her daughter.

Julia Mosher Collins died May 4, 1920, with no knowledge of the assignment that deprived her estate and her infant daughter of a $9000.00 inheritance. T. of R., P. 84. The assignment not being of record no one had knowledge of it. The other instruments that placed the ownership of the mortgage in Julia Mosher Collins, and the ownership of the land in Hattie L. Mosher, were all of due record in the Office of the County Recorder of Maricopa County, Arizona.

On April 11, 1921, James Dean Collins attempted to execute a Partial Satisfaction of Mortgage as to Lot 2, Block 3, Churchill. Plaintiffs' Exhibit 4, T. of R., P. 188. Said satisfaction was recorded April 18th 1921, at 1:12 P. M., the same date as the recordation of the Assignment from Julia Mosher Collins to James Dean Collins, and one minute later.

This Partial Satisfaction was acknowledged by James Dean Collins April 11, 1921, in Portland, Oregon. T. of R., P. 188. This was just 7 days before the assignment to him was placed of Record and 7 days

before he had anything to assign, and without consideration.

On March 31, 1926, James Dean Collins signed an extension of this $9000.00 Mortgage and on the same day purported to execute an assignment of this mortgage to A. B. C. Davenport. T. of R., P. 192.

The plaintiffs, in their complaint, Paragraph IV thereof, COMPLAIN that on March 1, 1929, that Hattie L. Mosher executed a note to Elsie B. Ganz for $6000.00, and to secure payment of said note executed a mortgage recorded March 6, 1929, "on the above described premises". T. of R., P. 3. No such mortgage was filed in evidence as an exhibit.

In plaintiffs' Exhibit 4, is the Gerard Mortgage for $9000.00, and following the mortgage; as recorded by Josephine Gerard and the signature of the Recording Deputy; are eight (8) notations, apparently not existing at the recordation of the mortgage itself. See T. of R., P. 177. Six of which are merely references to specified pages in other books.

The Certified Copy of this Gerard Mortgage in Defendants' Exhibit A. T. of R., pages 205 to 210. Indexed on page 197 as Section, or instrument, D., has no notations such as follow the mortgage as claimed by the plaintiffs in their Exhibit 4.

On September 16, 1931, O'Connell Brothers, Incorporated, signed a lease with Hattie L. Mosher, the owner of the property, for Lot 2, Block 3, Churchill, for five (5) years from October 1, 1932, with an option for two more years. T. of R., P. 220. Indexed on page

197 as Section, or Instrument, I., this said lease had a provision that O'Connell Brothers must pay all taxes during its term.

Plaintiffs' Complaint, COMPLAINS that Hattie L. Mosher neglected and refused to pay said note when the same became due, in Paragraph V. That September 16, 1931, Elsie B. Ganz filed a foreclosure suit. There is neither a note for $6000.00 nor any mortgage to secure it nor any mortgage, whatsoever, anywhere in the Transcript of Record; excepting the Gerard mortgage; nor in any Exhibit filed. However, in the T. of R., Pages 108 to 164, inclusive, being 57 pages, there are 2 notes and 2 mortgages, among other things, which the Clerk of the Court certifies to as "FOREGOING COPIES". There is no certificate as whether they were ALL of the instruments filed in No. 35462, or not. Both the 2 notes and 2 mortgages were a part of the Complaint in Plaintiffs' Exhibit I. The 2 notes and 2 mortgages were merely a part of the Complaint in No. 35462.

Julia C. Collins was not a party to the above purported lawsuit. Therefore her interests are in no way affected by No. 35462. Plaintiffs' Exhibit I., the purported Ganz' Foreclosure Suit.

It was claimed in Plaintiffs' Exhibit 2, Sheriff's Deed. T. of R., P. 164, that:

"in a certain action then pending"

that the Sheriff levied on Lot 2, Block 3, Churchill, and ultimately sold the same. There is no Lawsuit number connected with this so-called "Sheriff's Deed", and the deed is somewhat indefinite.

However if there is claimed to be a connection between it and No. 35462; the complaint of which was filed in a State Court while the Certificate is by the Clerk of the Maricopa County Clerk, whose certificate shows that the nine (9) instruments were filed in

"Title of Superior Court and Cause"

setting forth no plaintiff and no defendant; it is of no consequence as Julia C. Collins was not a party to either No. 35462, nor was she a party to any suit resulting in a Sheriff's Deed.

On June 6, 1934, Elsie B. Ganz deeded whatever rights she held in the property to Joe O'Connell. See Plaintiffs' Exhibit 3. T. of R., P. 169.

On May 8, 1935, Julia C. Collins filed suit by her Guardian ad litem to foreclose the $9000.00 Gerard mortgage which she inherited from her mother, Julia Mosher Collins. See T of R., P. 233, in the Order for Decree Pro Confesso, which is the first paper in Defendants' Exhibit D, from Equity 319.

The Record Pages from 233 to 260, inclusive, are the five (5) essential instruments in Equity 319. They are:

The Findings of Fact, found and signed, by the Honorable Dave W. Ling, T of R., Pages 234 to 238, inclusive, are here referred to, and adopted herein, and made a part of this Brief, as though incorporated in this Part I, of this Statement of Facts, presented in Defendants' Opening Brief.

There was some evidence as to payment of taxes by Joe O'Connell and some Tax Receipts were filed as Plaintiffs' Exhibit 5, which are not incorporated in the Transcript of Record, but the evidence conclusively showed that the possession of the premises was at all times in O'Connell Brothers, Incorporated. See testimony of Joe O'Connell. T. of R., P. 78, and page 85. Also two photographs filed as Defendants' Exhibits, B, taken in 1940, and C, taken in 1932, shortly after the O'Connell Brothers took possession under their lease from Hattie L. Mosher, the owner.

Moreover the Record fails to show five consecutive years of tax payments by anyone. Likewise the record shows that the defendant, Julia C. Collins, appellant here, had not been of age five years when this

suit was filed. T. of R., P. 86. Also see Findings of Fact signed by the Honorable Judge Dave W. Ling, December 28, 1936, T. Of R., P. 235.

The sole question then is whether under the law, and under the evidence, which stands practically undisputed, Julia C. Collins is the owner of Lot 2, Block 3, Churchill Addition.

If the Assignment of Mortgage to James Dean Collins made by Hattie L. Mosher, Attorney in Fact; which changed the holder of a mortgage on land she owned, herself, to another holder; and the various instruments following it, are not valid then Julia C. Collins is the owner of the land under her foreclosure of the $9000.00 Gerard Mortgage that she inherited, in her infancy, from her mother. Otherwise the respondents would own it unless other points raised in this Brief, and the Record, negative those claimants.

ARGUMENT OF LAW POINTS.

1—The validity of all muniments of title involved in this case, in so far as such validity may be governed by statute is controlled by the Revised Statutes of Arizona, 1913, Civil Code.

2, 3, and 4—The Plaintiffs' Exhibit 1, the Ganz Foreclosure Suit, is not binding on Julia C. Collins because she was not a party to said suit. This is fundamental, and essential, to an understanding of this case and applies to all instruments based upon, or derived from, said Foreclosure Proceedings.

5—The record discloses that Mrs. Ganz, or her Attorney, and agent, J. L. B. Alexander, knew that her mortgage was a second mortgage. See Paragraph IV of the Amended Answer, T. of R., Pages 10 and 11. Also see T. of R., 99, also P. 101.

6—O'Connell Brothers could obtain no adverse possession because the record shows that such payment of taxes was not adverse but rather in recognition of the title of H. L. Mosher, because of the provision for such tax payment contained in the Lease filed in Defendants' Exhibit A, indexed as Section I. In this Lease, 5th Agreement, T. of R., P. 231.

7—Plaintiffs' Exhibit 3 shows that the Warranty Deed from Ganz to O'Connell excepts the paying of taxes among other exceptions. T. of R., P. 170.

8—Certain tax receipts, which constitute Plaintiffs' Exhibit 5, are not incorporated in the Transcript of Record.

9—Defendants' Exhibit E shows that the

"Phoenix Title and Trust Company"

is the real party in interest in this suit and not the named plaintiffs. T. of R., P. 262, which says:

> "* * * and this cloud is being removed by an action to quiet title, soon to be instituted by the Phoenix Title and Trust Company in my behalf. * * *"

10—The instruments in Plaintiffs' Exhibit 4; excepting paper 2, the Gerard-Mosher Extension, T. of R., P. 178; and paper 3, the Gerard Assignment of

her $9000.00 Mortgage to Julia Mosher Collins, T. of R., P. 181; do not comply with the Revised Code of Arizona, Civil Code, 1913, because paper 4, T. of R., P. 185, is not in the form as provided by said Statute. It is acknowledged as an individual and not as an Attorney in Fact. Also it attempts the delegation of a power of attorney by the holder of a power of attorney. It is fundamental that only the principal could do that.

11—The twelve instruments in Defendants' Exhibit A, pages 196 to 233, inclusive of the T. of R. show conclusively the fee simple title in Julia C. Collins. The Transcript of Judgment, page 224; the Certificate of Sale, page 225; the Deed, page 228; show also the approval of the local District Judge.

12—Exhibit B is a photograph showing the possession of O'Connell Brothers July 18, 1940, six months after the suit was filed. Exhibit C is a photograph of the premises taken June 15, 1932, shortly after the O'Connell Brothers moved in under their lease with Hattie L. Mosher, the owner.

13—Defendants' Exhibit D, the certified copies of Equity 319, pages 233 to 259, inclusive, of the Transcript of Record, show the fee simple title in Julia C. Collins. They are the five essential instruments from the Foreclosure Suit of Julia C. Collins.

The attention of the Appellate Court is respectfully called to the Findings of Fact signed by the Honorable Judge Dave W. Ling, T. of R., P. 234.

14—The Fourteenth Point speaks for itself, page 60, and shows that the fee simple title in Julia C. Collins should never have been disturbed.

15—The Objections to the Statement of Costs should have been sustained. See Memorandum of Costs, T. of R., P. 40. Also see the Objections, T. of R., P. 42. Even if the judgment is reversed this Appellate Court should decide if a Clerk of a United States District Court can stretch his arm out a long quarter of a mile and grasp costs and publications that were incurred in a Maricopa County Superior Court, before removal.

16—As this Court will recall from the statement of this case, appellees' asserted title is bottomed upon the fact that J. D. Collins released the mortgage from Greene and Griffin to J. Gerard (assigned by J. Gerard to Julia Mosher Collins) on Lot 2, Block 3, Churchill prior to the making of the mortgage on Lot 2, by and through which appellees claim. If the partial release of mortgage signed by J. D. Collins as to said Lot 2, Block 3, was for any reason void upon its face as to appellees' predecessors in interest then, of course, the mortgage to Mrs. Ganz through which respondents claim was a second mortgage and appellant Julia C. Collins' title is good.

Unless J. D. Collins had some interest in the Greene and Griffin mortgage to J. Gerard he could not release Lot 2.

The interest of J. D. Collins in the Gerard mortgage was derived, if at all, through the purported assign-

ment of said mortgage from Julia Mosher Collins to James D. Collins, T. of R., P. 183.

This assignment is an essential link in appellees' Chain of Title.

IT IS THE SINE QUA NON OF APPELLEES' CASE.

This assignment of mortgage, the record discloses, was not signed by said Julia Mosher Collins, but was signed by the agent of said Julia Mosher Collins and only a short time prior to the death of said Julia Mosher Collins.

There is a principle of law which estops a principal from repudiating the acts of his agent to the detriment of third parties.

The knowledge of the agent is ordinarily imputed to his principal and according to some cases the recording of the assignment, by the agent after the death of the principal could not be availed of by the heirs and beneficiaries of the deceased principal.

However, to all of these principles of law there is one exception which is as well recognized as the general rule itself.

The exception is a case where the third parties know, or are charged with knowledge, that the agent had an interest in the subject matter of the transaction.

In the instant case the original mortgage was made by Greene and Griffin to J. Gerard and the title to the

land, subject to the said mortgage, was purchased by Hattie L. Mosher.

Therefore when the assignment of this particular mortgage was made transferring the ownership from Julia Mosher Collins, to her husband James Dean Collins, it was apparent upon the very face of the record that the agent was dealing with, and transferring, a mortgage upon her own land.

It is true that the transfer was made by the grandmother of appellant, Julia C. Collins, from her daughter to her son in law, but the law indulges no presumptions in favor of an agent against his principal where there is a personal interest of the agent involved.

The evidence in the instant case showed a very definite notice on the part of the agent for the transfer. First of all the transferee released the mortgage upon the particular lot now in question without any consideration. See T. of R., P. 105.

Secondly the evidence shows that very shortly after the assignment Julia Mosher Collins died.

If the assignment had not been made the mortgage would have been tied up in probate and the portion of the property covered by the mortgage, which was released as to Lot 2, by James D. Collins without consideration, could not have been released in this manner, and the whole thereof would have been subject to the jurisdiction of the Probate Court in Oregon.

Such an evasion of the probate law is surely against Public Policy and would render an assignment made

for such a purpose void, or voidable, at the option of the heirs of the deceased person.

Appellants, however, are not basing their case upon the actual illegality of the transaction, as it now appears to be, nor upon any loss which the mortgagee may have sustained by reason of the assignment, but rather upon the single fact which is undeniable, that the agent and attorney in fact had an interest of record in the mortgage assigned and therefore the assignment was IPSO FACTO void, or voidable, at the option of Julia Mosher Collins, the original principal, or her heirs, in the absence of a showing of knowledge or consent on their part. No such knowledge or consent was shown on the part of any of said persons and there were no facts in the evidence from which such knowledge or consent could be presumed, or inferred.

No principle is more firmly fixed in the law than that whenever an agent has, or acquires, an interest in the subject matter with which he purports to deal on behalf of his principal the latter will not be bound unless the principal, with full knowledge of the transaction, ratifies the act of his agent.

Without further comments, except such as are essential by way of connection, appellants before drawing this brief to a close will cite a number of cases which touch upon the principles of law involved in this argument and quote from a few selected cases which are typical of the mass of cases upon this particular subject.

AUTHORITIES.

In the case of:

Glover v. Ames, from the Circuit Court D, Maine,

it was held:

"Contract was held invalid because the agent had a personal interest in the sale of a brig."

also

"(1) That B, as agent, in thus disposing of the vessel to C to pay a firm debt, for which he was individually accountable, was acting in a matter in which his own personal interests were in conflict with the interests of the plaintiff, and the sale was therefore invalid."

Glover v. Ames, 8 Fed. 351.

In the case of:

City of Findlay v. Pertz, Circuit Court of Appeals, Sixth Circuit,

the court quotes in:

66 Fed. (starts on page 427) at page 434, from: *Leake on Contracts,* 3rd Ed. 409,

as follows:

" 'An agent cannot be allowed to put himself in a position in which his interest and his duty conflict.' "

The Court then says that:

"The tendency of such agreement is to corrupt the fidelity of the agent, and is a fraud upon the principal, and is not enforceable, 'even though it does not induce the agent to act corruptly'."

The court continues in *Findlay v. Pertz:*

> " 'It would be most mischievous to hold that a man could come into a court of law to enforce a bargain on the ground that he was not in fact corrupted.
>
> It is quite immaterial that the employer was not damaged.' "
>
> *Wald's Pol. Cont.* 245, 246, note,

citing:

> *Harrington v. Dock Co.,* 32 B. Div. 549, and other cases.
>
> *Taussig v. Hart,* 58 N. Y. 425;
>
> *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.,* Ohio State, 450 to 460;
>
> *Smith v. Sorby,* 3 Q. B. Div. 552;
>
> *Young v. Hughes,* 32 N. J. Eq. 372;
>
> *Yeoman v. Lasley,* 40 Ohio State 190.

> "Contract made by agent acting for both parties may be rescinded by buyer having no knowledge of the dual capacity of the agent."
>
> *City of Findlay v. Pertz,* 66 Fed. 427, 13 C. C. A. 559, 31 U. S. App. 340.

The Supreme Court of New York, General Term, First Department, has held that when an agent was interested in accepting a tendered company for constructing a road for his principal was sufficient to make the contract voidable.

"Agent had an interest in accepting plaintiff's tendered company for constructing the road and therefore contract was voidable."

Smith v. Seattle L. S. & E. Ry. Co., 72 Hun. 202, 25 N. Y. Supp. 368.

The District Court of Kansas, First Division, has said, in:

Stephens v. Gall, 179 Fed. 938, at page 941;

"Therefore it is axiomatic in the law of agency that it looks with jealousy upon all transactions of the agent

'and condemns, not only as invalid as to the principal, but as repugnant to public policy, everything which tends to destroy that reliance.'

Keighler v. Savage Mfg. Co., 12 Md. 383, 71 A. Dec. 600.

Mechem on Agency Sec. 455,

thus expresses the rule:

'Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal.'

This doctrine, as stated by the court in.

Tisdale v. Tisdale, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775:

* * * has its foundation, not so much in the commission of actual fraud, as in the profound knowl-

edge of the human heart which dictated that hallowed petition,

'Lead us not into temptation, but deliver us from evil;'

and that caused the announcement of the infallible truth that

'a man cannot serve two masters'.

Gall without the consent and authority of the company could not, as its agent, purchase grain, stocks, and securities, and at the same time by agreement with himself as agent and in his own right for their joint benefit.

SUCH A TRANSACTION WAS CONTRARY TO SOUND PUBLIC POLICY, and the complainant, so far as it appears from the bill of complaint, knew at the time that Gall was claiming to act as agent for the defendant corporation, and as a matter of law he knew that Gall was not authorized to enter into such arrangement so as to bind the company jointly with himself in his independent, individual character."

Stephens v. Gall, 179 Fed. 938 at 941.

The Supreme Court of Illinois has said in *Fox v. Simons* (251 Ill. 316), 96 N. E. 233, on page 235.

"It is a familiar doctrine, frequently recognized by this court, that an agent cannot either directly or indirectly have an interest in the business of the principal within the scope of his agency with-

out the consent of his principal, freely given, after full knowledge by the principal of every matter known to the agent which might in any way affect the interests of the principal, and it is of no consequence in such case that no fraud was intended, or that no advantage was, in fact, derived by the agent.

1 Perry on Trusts (6th Ed), Sec. 206;

Tyler v. Sanborn, 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 97;

1 Pomeroy's Eq. Jur., Sec. 155;

Prince v. Dupuy, 163 Ill. 417, 45 N. E. 298."

From:

Fox v. Simons, 251 Ill. 316; 96 N. E. 233 on page 235.

The Supreme Court of North Carolina has said that:

"* * * an agent cannot, without the knowledge of his principal, represent himself and the principal, where their interests conflict."

Swindell v. Latham, 145 N. C. 144, 122 Am. St. Rep. 430, 58 S. E. 1010.

The Supreme Court of Oregon has said:

"The fidelity of an agent demands this rule:

the acts of an agent in dealing with the subject-matter of his trust or agency which has been confided to his care are scrutinized by the court with jealous care and may be set aside on slight

grounds. *Twin-Lick Oil Co. v. Marbury,* 91 U. S. 587, 21 L. Ed. 328."

Burton v. Lithic Mfg. Co., 73 Or. 605, 144 Pac. 1149 at 1151.

The Supreme Court of Iowa has said that an attorney in fact has no implied authority to deal with or sell to himself.

In re Acken's Estate, 144 Iowa 519, 123 N. W. 187.

Neither is it necessary to show actual fraud on the part of the agent.

Hutton v. Sherraid, 183 Mich. 356, 150 N. W. 135.

It has also been said that an agent must use his authority with an eye single to the interest of his principal.

Sabin v. Bierbaum, 281 Fed. 500 (8th Circuit).

From the *United States Supreme Court,* itself, we quote:

"If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee of the principal, and at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale, and

this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will not inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues, he must act, in the matter of such agency, solely with reference to the interests of his principal.

The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal."

Robertson v. Chapman, 152 U. S. 673 at 681-2.

It has been said by the Supreme Court of Arizona that the duty of an agent to exercise his duties faithfully rests upon positive law and not upon estoppel.

Button v. Wakelin, 41 Ariz. 84, 15 Pac. (2d) 956.

For other cases enumerating the same principles see:

Porter v. Woodruff, 36 N. J. Eq. 174, 176;

Marsh v. Whitmore, 21 Wall. 178, 22 L. Ed. 482;

Stimpson v. Commissioner of Internal Revenue, 55 Fed. (2d) 815;

Rudin v. King-Richardson Co., 37 Fed. (2d) 637;

Ingraham v. Fidelity Phoenix Fire Ins. Co. of N. Y., 16 F. (2d) 251.

In a late case in the Surrogate's Court in New York the court recognized the rule:

"Requiring the strictest scrutiny in cases of divided loyalty and self-interest."

In re Willett's Estate, 17 N. Y. S. (2d) 578.

The Text Writers likewise recognize the rule. We quote from Restatement of the Law (which is the law in Arizona in the absence of contrary decisions) as follows:

Sec. 165, *Restatement Law of Agency,* page 403, "A disclosed or partially disclosed principal is subject to liability upon a contract purported to be made on his account by an agent authorized to make it for the principal's benefit, although the agent acts for his own or other improper purposes, unless the other party has notice that the agent is not acting for the principal's benefit."

Comment b. (page 404).

"Whether or not the third person has reason to know of the agent's improper motive is a question of fact. If he knows that the agent is acting for the benefit of himself or a third person, the transaction is suspicious upon its face and the principal is not bound unless the agent is authorized. Thus where the agent signs the principal's name as an accommodation endorser, makes a gift of

the principal's property, or accepts in payment of a debt owed the principal the satisfaction against himself, the other party obtains no rights against the principal because of such transaction."

Again:

Sec. 166, page 406,

"If a third person has such information as would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the conditions known to him, he cannot subject the principal to liability. Any substantial departure by an agent from the usual methods of conducting business is ordinarily a sufficient warning of lack of authorization." Comment a.

Also see Sec. 112, page 292—Rest. Agency, Vol. 1. Comment b—

"* * * Where the agent acquires an interest adverse to that of the principal, and this is not known to the principal, ordinarily he should realize that the principal would not desire him to continue to act, although he does exactly what he would have done otherwise.

Secs. 387-409

state the duties of loyalty of an agent and the consequences of the breach of such duties as between the principal and the agent."

We also quote from *Mechem on Agency* as follows:

"* * * When, therefore, the agent while ostensibly acting only for his principal, is secretly

acting as the agent of the other party, or is himself the other party, the act done, or contracts made, by him will not be binding upon the principal if he sees fit to repudiate them."

Mechem, Agency, Vol. 2, Second Ed. Sec. 1728, page 1311.

"Agent cannot sell to himself and another."

Reeves v. Callaway, 78 S. E. 717, 140 Ga. 101.

"Sale to partnership in which agent is a member or corporation into which such partnership is converted may be set aside."

Bedford Coal & Coke Co. v. Parke County Coal Co., 89 N. E. 412, 44 Ind. App. 390.

"Principal is not chargeable with notice of invalidity of bonds pledged as collateral for a note of irresponsible maker when agent was acting in fraud of his principal."

Thomson-Houston Electric Co. v. Capitol Electric Co. (C. C.), 56 Fed. 849.

"It is a settled principle of Equity that where a person undertakes to act as an agent for another, he cannot be permitted to deal in the subject-

matter of that agency upon his own account and for his own benefit."

2 *Am. Jur.* page 21, Sec. 261; citing:

Kurtz v. Farrington, 104 Conn. 257, 132 A. 540, and many other cases.

"In all cases where, without the assent of the principal, the agent has assumed to act in a double capacity, either principal may avoid the transaction, at his election, without showing that he was injured.

Actual injury is not the principle upon which the law holds such transactions voidable; the law holds them voidable in order to prevent the agent from putting himself in a position where he will be tempted to betray his principal."

2 *Am. Jur.* 213, Sec. 265.

"It is a settled principle of equity that where a person undertakes to act as an agent for another, he cannot be permitted to deal in the subject-matter of that agency upon his own account and for his own benefit."

2 *Am. Jur.* page 210, Sec. 261, *supra,*

which is here repeated for the purpose of emphasizing the acts of the holder of a power of attorney who used it for two self-benefits, viz.:

a. Keeping the mortgage out of the Probate Court of a far-distant state, and

b. Getting the mortgage into the hands of a person who would not be likely to oppose the signing of papers she sent up to be signed by him.

The whole World had notice of this self-benefit, and self-interest, as she was the recorded owner of the land in question, and, as all deaths were required to be publicly recorded, Notice of the death of the original owner of the mortgage one year before this fraudulent assignment was put of record, was Notice to All.

No principle is better established in the law than that loyalty to his trust is the first duty which every agent owes to his principal. It underlies all agencies. The law condemns as contrary to public policy any conduct in an agent which involves a breach of fidelity in that relationship which is most jealously guarded. An agent will not be permitted to place himself in a position where his own interests may become antagonistic to those of his principal. The law by which an agent is bound to regulate his conduct "is a law of jealousy". And an agent who is authorized to sell his principal's property certainly cannot, without his principal's consent, purchase property for himself. The above are the principles expressed throughout in *Porter v. Woodruff,* 36 N. J. Eq. 174 to 188 inclusive, and the case is so appropriate that we ask the Court to consider the entire reading of this pertinent opinion as an appropriate part of this brief.

Other cases are:

Marsh v. Whitmore, 21 Wall. 178, 22 L. Ed. 482;

Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592.

See also:

Starkweather v. Conner, 38 P. (2d) 311, 44 A. 369;
Winget v. Rockwood, 69 F. (2d) 326;
Quines v. Davis, 26 F. (2d) 80;
Am. Law Inst. Restatement, Agency, 393;
Mechem on Agency, Section 754.

FIDELITY TO HIS TRUST IS THE FIRST DUTY OF ANY AGENT.

This principal is so firmly rooted in the law that whenever an agent has, or acquires, an interest in the subject matter with which he purports to deal on behalf of his principal, the latter will not be bound unless the principal, with full knowledge of the transaction ratifies the act of his agent.

In the Court of Civil Appeals, of Texas,
Judge W. S. Fly,
Chief Justice,
wrote the Opinion in:

Binder v. Milliken, 201 S. W. R. Beginning on page 239. *Opinion* by Judge Fly, page 240,

who said:

"(3) The law abhors double dealing, especially upon the part of one in whom a trust is reposed and confidence given; and when the agent turns aside from the plain paths of his agency and seeks individual advantage inconsistent with, and antagonistic to, the rights and interests of his principal, his authority is automatically destroyed and agency revoked. He cannot be permitted to hold a position where self-interest and

honor become contending forces, and where dire temptation would assail and ordinarily conquer him.

The rule is thus stated by

Mechem on Agency, Section 751.

Quoting from the same author,

Mechem on Agency, Section 754,

'It is fundamental that an agent, without the full knowledge and consent of his principal, will not be permitted to act as agent in transactions in which he is personally interested.

It is often said that his endeavor to do so is therefore enough to put the other party on his guard.'

As said in:

Pine Mt. Coal Co. v. Bailey, 94 Fed. 258, 36 C. C. A. 229:

'As long as the agent is conducting negotiations for his principal with third parties he may act on his behalf; but the moment he undertakes, without the knowledge of his principal, to conduct them with himself, his agency ceases, and the powers and liabilities of that relation no longer exists.'

The law is so jealous of the good faith and loyalty of agents that it will not permit the agent to blend his private interests with those of his principal, and no such authority will be allowed unless granted in express terms by the principal. This principle is clearly stated by the New York Court of Appeals in the case of

Bank of New York v. American Dock and Trust Co., 143 N. Y. 559, 38 N. E. 713,

In which it was held an agent authorized to receive goods for storage and issue warehouse receipts therefor did not have authority to issue receipts to himself. The court said:

'It is an acknowledged principle of the law of agency that a general power of attorney or authority given to the agent to do and act in behalf of the principal does not extend to a case where it appears that the agent himself is the person interested or the other side.

If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it; for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time.'

The principle is reasonable, and there is no escape from it. The courts of Texas have followed the rule stated, and in the case of:

Cotton v. Rand, 93 Texas 7, 51 S. W. 838, 53 S. W. 343,

The Supreme Court of Texas says:

'We are clearly of the opinion that such a breach of duty on part of an agent, unless condoned by the principal with a full knowledge of the facts, puts an end, ipso facto, to the agency.

The law requires fidelity of agents and holds them no longer capable of representing their principals when without the knowledge of the latter, they acquire an interest in the matter of the agency adverse to their employers.' "

Binder v. Milliken, 201 S. W. R. Beginning on page 239. *Opinion* by Judge Fly, page 240.

From all of the foregoing authorities it is plain to see that neither a principal, nor his heirs, will be bound by the acts of his agent done in the furtherance of a purpose in which the agent has a personal interest.

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Respectfully submitted,
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